No. 321

JUL 2 0 1957

JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

BARBERS UNION OF MEMPHIS, LOCAL NO. 36, GEORGE McNAMARA, Secretary of Local No. 36; J. P. OSBORNE; TINTO O. MASNER; LEE SAXTON; and I. C. CRAWFORD,
Petitioners,

v.

L. A. FLATT,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

CECIL D. BRANSTETTER,
104 Stahlman Building,
Nashville, Tennessee,
Attorney for Petitioners.

MOORE, CROWNOVER, BRANSTETTER & FOLK,
104 Stahlman Building,
Nashville, Tennessee,
ROBERT A. TILLMAN, Esq.,
81 Madison Building,
Memphis 3, Tennessee,
Of Counsel.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

INDEX.

	Page
Opinion below	1
Jurisdiction	2
Questions presented	3
Constitutional provisions involved	4
Statement of the case	5
Constitutional questions in the courts below	11
Reasons for granting the writ	11
Argument	14
Question No. 1	14
Question No. 2	18
General considerations	19
(1) Tennessee public policy	20
(a) Legislative or constitutional authority	20
(b) Court decisions	23
(c) The facts of this case	28
Conclusion	30
Certificate of service	30
Appendix A—On petition to rehear	31
Appendix B—Opinion	35
Appendix C—Minutes of the Supreme Court, Minute Book 44, page 913	39
Appendix D—"So-called right to work law"	40
Appendix E—Senate Joint Resolution No. 77	41
Appendix F—House Bill No. 597 (PIR 2-26-57)	43
Appendix G—Senate Bill No. 98 (PIR 1-21-57)	44

Cases Cited.

A. F. of L. v. Swing, 312 U. S. 321 ..... 3, 11, 14, 17, 18, 25
American Steel Foundaries v. Tri-City C. T. Council, 257 U. S. 184 ..... 15-16, 24
Bailey v. Master Plumbers, 103 Tenn. 99, 100 (1899) .. 23
Building Service Employees Local 262 v. Gazzam ... 11, 29
Carroll v. Evlen, 178 Tenn. 146, 153 (1941) 10
Charles F. Rogers et al. v. W. F. Rogers et al., 53 Tenn. 489, 495 (1871) 10
Duke v. Local Union No. 437 et al., 191 Tenn. 495, 499 (1950) 21
Gospel Army v. City of Los Angeles, 331 U. S. 543 (1947) 2
Hobbs et al. v. Hobbs et al., 179 Tenn. 1, 5 (1941) 10
International Brotherhood of Teamsters, Local 695, v. Vogt, Inc. (U. S. Supreme Court, No. 79, June 17, 1957) 3, 11, 13, 14, 20, 25
Ira A. Watson Co. v. Wilson et al., 187 Tenn. 402 27
Lyle v. Meatcutters, 174 Tenn. 222 (1939) 24, 25, 26, 28
Oyama v. California, 332 U. S. 633 18
Plumbers Union v. Graham, 345 U. S. 192 18
Rowe v. International Brotherhood, 186 Tenn. 265 (1947) 26
State Board of Architectural and Engineering Examiners v. Blalock, 190 Tenn. 626, 630 (1950) 10
Teamsters Union v. Hanky, 339 U. S. 470 11
Thornhill v. Alabama, 310 U. S. 8[illegible] 3, 11, 14, 25
Ward v. Crisp, 189 Tenn. 513, 521 (1[illegible]) 10

Statute Cited.

28 U. S. C., § 1257 (3) 2

Constitution Cited.

Constitution of the United States:
Article VI, Clause 2 4
First Amendment 3, 11, 12, 14, 18, 24, 29
Fourteenth Amendment 3, 11, 12, 14, 18, 20, 24, 29

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956.

BARBERS UNION OF MEMPHIS, LOCAL NO. 36, GEORGE McNAMARA, Secretary of Local No. 36; J. P. OSBORNE; TINTO O. MASNER; LEE SAXTON; and I. C. CRAWFORD,
Petitioners,

v.

L. A. FLATT,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of the State of Tennessee.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners pray that a Writ of Certiorari issue to review the decree of the Supreme Court of the State of Tennessee entered on May 3, 1957 in the case there entitled L. A. Flatt v. Barbers Union, etc., et al.

OPINION BELOW.

An opinion was entered by the Supreme Court of the State of Tennessee on May 3, 1957, and is reported in 57 A. L. C. 939 (not published as yet in Tenn. Reports or Southwestern Reports) (Printed in full in Appendix A).

JURISDICTION.

The decree of the Supreme Court of the State of Tennessee was entered on May 3, 1957, and the procedendo to the Chancery Court for Shelby County, Tennessee provided that the petitioners herein "be and they are hereby forever and perpetually enjoined from picketing or otherwise obstructing or interfering with complainant's barber shop and home located at 1329 North Hollywood, Memphis, Tennessee." The decree of the Chancery Court for Shelby County, Tennessee, was affirmed and the cause remanded to the Chancery Court for Shelby County, Tennessee, for the enforcement of the decree of the Supreme Court of the State of Tennessee and for the collection of costs (R. 135).

The jurisdiction of this Court is invoked under 28 U. S. C., § 1257 (3).

On February 8, 1957, with one of the five justices of the Supreme Court of Tennessee dissenting, an opinion and decree[1] was entered reversing the Chancery Court for Shelby County, Tennessee, and dissolving the injunction (R. 121, 126, 128). A petition to rehear on behalf of the complainant, L. A. Flatt, was filed by an *amicus curiae* on February 15, 1957 (R. 108), and granted May 3, 1957, and an opinion and decree entered revoking and annulling the previous opinion and decree and affirming the Chancery Court for Shelby County, Tennessee by making the injunction against the petitioners herein permanent and perpetual and remanding the same for enforcement and collection of costs. Said decree is a final decree[2] since said decree made the injunction permanent and perpetual and remanded the same for enforcement and collection of costs,

---

[1] Original opinion in full Appendix "B".

[2] Gospel Army v. City of Los Angeles, 331 U. S. 543 (1947). Final Decree printed in full Appendix "C".

and was entered by the highest court in the State of Tennessee, in which a decision could be had. This final decree was approved by four justices of the Supreme Court of Tennessee with one justice dissenting (R. 129, 134, 135).

QUESTIONS PRESENTED.

1. May a state court, consistent with the First and Fourteenth Amendment, enjoin truthful and peaceful picketing where the purpose of the picketing is to advertise to the public that an employer is non-union and to persuade him to raise his prices for barbering services when wages are based on the cost of such services in order to preserve the economic advantages of higher pay and better working conditions for employees of the competing employer who is being picketed when such injunction is based on the proposition that the result of such picketing as distinguished from the purpose thereof will be that the consuming public will have to pay a higher price for the services of the employer being picketed, and that such picketing will cause damage to the picketed employer? Does this not constitute a blanket prohibition against picketing as condemned by this Court in **International Brotherhood of Teamsters, Local 695, v. Vogt, Inc.** (U. S. Supreme Court, No. 79, June 17, 1957); **A. F. of L. v. Swing**, 312 U. S. 321, and **Thornhill v. Alabama**, 310 U. S. 88?

2. May a state court, consistent with the First and Fourteenth Amendment, and particularly the due process clause of the Fourteenth Amendment, permanently enjoin peaceful and truthful picketing on findings of fact inconsistent with the record and under a state court procedure which does not permit the union to be heard or to introduce proof on the issue of the lawfulness of its conduct?[3]

---

[3] See Footnote 4, infra.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Constitutional provisions involved are: Article VI, Clause 2 of the Constitution of the United States, which reads as follows:

> "Article VI, Clause 2.
>
> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding."

Amendment 1 of the Constitution of the United States which reads as follows:

> "Amendment I.
>
> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Amendment 14, paragraph No. 1, of the Constitution of the United States which reads as follows:

> "Amendment XIV.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

Petitioners are a labor organization and its officers, known as Local 36 of the Barbers Union, affiliated with the Journeymen Barbers, Hairdressers & Cosmetologists International Union of America, AFL-CIO. Respondent is the owner and operator of a non-union barber shop in Memphis, Tennessee. On May 21, 1956, the respondent filed his original complaint in the Chancery Court for Shelby County, Tennessee, against the petitioners herein, its officers and agents, seeking an injunction against peaceful and truthful picketing of the respondent (R. 7, 8).

The complaint specifically alleged that:

> "L. A. Flatt, complainant, would respectfully show to the Court that he is a non-union barber, living and conducting the business at 1329 N. Hollywood Street, Memphis, Tennessee: that he is advanced in years and has been a barber for a great many years, in Memphis.
>
> "That he has a five-year lease on the above numbered property.
>
> "That the named defendants have for several months been trying to force him to join the local barber's union and raise his prices for barbering 25%, haircuts from 75¢ to $1.00; that he is not willing to do this and to join the barbers union and he refuses to do so.
>
> . . . . . .
>
> "The sole cause and purpose of the defendants is to intimidate, coerce and force complainant to raise his prices and join the union, which is against complainant's will and wishes and complainant will suffer great loss, damage and injury, if the said defendants are not restrained and enjoined from doing said acts of picketing' in any manner, and complainant's loss and damage will be irreparable, as the acts will tend

to destroy complainant's barbering business and that is his sole trade and means of earning a living.

. . . . . .

"The said barbers union, Local 136 (sic) thru (sic) their officers or members, have prevailed upon the Memphis Linen Supply Company in Memphis to refuse to deliver necessary laundry and barber's supplies to the complainant, in an effort to force and hurt complainant's barber business.

. . . . . .

"Therefore, complainant charges that defendants are guilty of illegally interfering with and obstructing and injuring his business, by hiring and placing pickets in front of his home and barber shop at 1329 N. Hollywood St., Memphis, Tennessee, with the intention of destroying complainant's barber business. And they are guilty of causing, by force, intimidation and coercion, the Memphis Linen Supply Company, not 'to do further business with this complainant" (R. 7, 8, 9).

Based upon the foregoing allegations a temporary injunction was issued by the Chancery Court of Shelby County, Tennessee, on May 31, 1956, enjoining the defendants from:

" . . . picketing or otherwise obstructing or interfering with complainant's barber shop and home located at 1329 North Hollywood, Memphis, Tennessee, . . . " (R. 24).

The defendants filed a sworn answer in which they stated:

"Defendants deny that they or any one of them have for several months been trying to force complainant to join the local barber's union. They admit that several months ago, in 1955, a group of individual barbers did call upon the complainant, inviting him

to join with them in an effort to raise the standards of barbers with respect to hours, wages and other conditions of employment. They admit that complainant refused their invitation.

"Defendants admit that for a time last fall, the defendant union placed pickets on the sidewalk in front of complainant's home and barber shop, which are both under one roof, and that said pickets carried signs with printed legends thereon, but deny that said legends read, 'This shop is unfair to the Barbers Union,' and would show that legends printed on the picket signs were as follows: 'This shop does not employ union barbers.'"

The answer then denies that more than one picket was ever used in picketing the respondent's place of business, and specifically avers:

"Defendants would show that all of said pickets were and are members of Memphis Barbers Union.

"Defendants deny that said picket was intended to force complainant to join the union.

. . . . . .

"Defendants deny that the Barbers Local Union, through its officers or members, have prevailed upon the Memphis Linen Supply Company to refuse to deliver necessary laundry and barber supplies to the complainant, but aver that if union barbers individually have prevailed upon the Memphis Linen Supply Company to refuse to deliver said supplies to complainant that the right to do so is lawful and is not actionable at law or in equity."

. . . . . .

"Defendants, for further answer, would show to this Honorable Court that Barbers Union of Memphis,

Local No. 36, is the collective bargaining representative for the employees of a substantial majority of all barber shops in the City of Memphis; that after many years of its existence it has procured for the working barbers employed in said shops reasonable conditions of employment, including hours of work, and wages; that the complainant has not and is not observing the minimum standards provided for in defendant union's contract with employers and barber shops competitive to complainant.

"Defendants, further answering, assert that complainant employs three barbers, who work with him in the shop located as heretofore stated on Hollywood Street in Memphis, Tennessee; that they approached complainant requesting that he observe the minimum standards provided for in the contract between defendant union and competitors of complainant; that defendants have never insisted that complainant employ union barbers, or that he discharge any of his present employees, and aver that they have never insisted upon any of said employees joining the defendant union.

"Defendants would show that complainant's failure to observe the aforesaid minimum standards provided for in the union's contract with shops competing with complainant constitutes a continuing threat to the continuous enjoyment of working conditions and rates of pay which have become standard in the business.

"Defendants would respectfully show that under the terms of the contract entered into by and between the union and the barber shops competing with the complainant provided that working barbers shall receive a commission of 70% of the revenue derived from said work, or $.70 for each hair cut, $.525 for each shave, $.70 for each shampoo, and $.245 for tonic,

these items constituting the usual work performed by said barbers.

"Defendants would further show that the hours of employment for union barbers, provided for in said contracts, include the hours between 8:00 A. M. and 7:00 P. M., with one hour off for lunch.

"They are advised and therefore charge and aver that the earnings of barbers employed by complainant are much less than those of union barbers and therefore the union and its members have an interest therein for the reason that competition could and in all probability would have a detrimental effect upon the earnings of union barbers.

"Defendants would show that for the reasons hereinabove set forth the defendant union has caused pickets to be placed at the barber shop of complainant which is located in an industrial area of the City of Memphis, inhabited by members of various union organizations, and that said picketing was conducted for the purpose of bringing to the attention of prospective customers of complainant the fact that said shop was and is being operated under non-union conditions.

"Defendants aver that said picketing constituted a primary boycott for a lawful purpose, that said picketing was and is being conducted in a lawful manner, and that the right to do so is protected under the Constitution, laws and court decisions of the State of Tennessee and the United States" (R. 17, 18, 19, 20, 21).

Following the filing of the sworn answer by the petitioners herein, the respondent filed his motion in the Chancery Court for Shelby County, Tennessee, asking that the cause be heard on Bill and answer, which said motion was granted by the Court (R. 25).

The cause was set down for hearing on bill and answer[4] on June 18, 1956, and at the conclusion of said hearing, an order was entered making the injunction permanent (R. 26, 27). An appeal was granted to the Supreme Court of Tennessee.

The appeal was heard on February 8, 1957, and an opinion and decree entered with one of the five justices of the Court dissenting, reversing the Chancery Court for Shelby County, Tennessee, and dissolving the injunction (R. 121, 126, 128). A petition to rehear on behalf of the respondent was filed by an amicus curiae on February 15, 1957 (R. 108), and granted May 3, 1957, and an opinion and decree entered revoking and annulling the previous opinion and decree, and affirming the Chancery Court for Shelby County, Tennessee, by making the injunction against petitioners permanent and perpetual, and remanding the same for enforcement and collection of costs. This final decree was approved by four justices of the Supreme Court of Tennessee with one justice dissenting (R. 129, 134, 135).

---

[4] Under Tennessee practice and procedure, when a cause has been set down for hearing by the complainant on bill and answer, the answer is admitted by the complainant to be true, and on the hearing of the cause thus set down every matter set up in the answer, whether responsive to the bill or purely in avoidance, must be taken as true. This rule includes even those matters which the defendant avers that he believes and hopes to be able to prove. And matters which the defendant neither admits or denies will be deemed denied when a cause is thus heard on bill and answer. State Board of Architectural and Engineering Examiners v. Blalock, 190 Tenn. 626, 630 (1950); Ward v. Crisp, 189 Tenn. 513, 521 (1949); Carroli v. Evlen, 178 Tenn. 146, 153 (1941); Charles F. Rogers et al. v. W. F. Rogers et al., 53 Tenn. 489, 495 (1871).

"The rule is, to quote Gibson's Suits, § 439, that, 'on the hearing of a cause on bill and answer, every matter set up in the answer, whether responsive to the bill or purely in avoidance, must be taken as true.' If this rule is applicable to this hearing, the action of the Chancellor was obviously correct, both in dissolving the injunction and dismissing the bill, as the answer specifically denied every material allegation of the bill." Hobbs et al. v. Hobbs et al., 179 Tenn. 1, 5 (1941).

CONSTITUTIONAL QUESTIONS IN THE COURTS BELOW.

1. Throughout the proceedings below, both before the Trial Court and on appeal, the petitioners contended that their conduct and actions in picketing the respondent was for a lawful purpose, being conducted in a lawful manner, and was purely for advertising purposes in the exercise of their right of freedom of speech and assembly as guaranteed by the the First and Fourteenth Amendment to the Constitution of the United States (R. 21).

Specifically on appeal, the respondent assigned as error:

> "The learned Chancellor erred in granting, on the facts in this case, the temporary and permanent injunctions against the defendant for the reason that the injunctions granted deprived defendants of their privileges and immunities guaranteed to them by the laws of Article I, Sections 19 and 23 of the Constitution of the State of Tennessee, and the Fourteenth Amendment to the Constitution of the United States, namely, their right to engage in free speech and free assembly by picketing and engagaing in other peaceful concerted activity" (R. 33).

REASONS FOR GRANTING THE WRIT.

1. The decision below, being based upon the erroneous assumption that the decision of this Court in **A. F. of L. v. Swing,** 312 U. S. 321, and particularly **Thornhill v. Alabama,** 310 U. S. 88, have been overruled by the Supreme Court of the United States in the subsequent cases of **Building Service Employees Local 262 v. Gazzam; Teamsters Union v. Hanky,** 339 U. S. 470, and related cases makes the decision of the Court below inconsistent with the holding of this Court in **International Brotherhood of Teamsters, Local 695, v. Vogt, Inc.** (No. 79, June 17, 1957).

2. The questions presented involve serious problems of the sort which have arisen and will continue to arise out of the interaction between the Fourteenth Amendment to the Constitution of the United States embracing the First Amendment, and decisions of state courts based on no known public policy, either constitutional, legislative or judicial of the state, with respect to the extent to which the citizens of the various states are entitled by the national constitution to disseminate information having to do with a union's effort to maintain or achieve a decent standard of living. Whether particular conduct or action taken in the name of freedom of speech and assembly by employees seeking to maintain decent wages and working conditions, or the methods and means by which they would use to further these objectives are within the protection of the national constitution or governed by unannounced and unknown or supposed public policy of a state, or the whims of state courts, is a matter of profound national importance. In this light, this case presents the necessity of this Court giving to the courts of the several states more detailed criteria by which they are to scrutinize and evaluate claims of federal rights asserted before them by organized labor in the name of the national constitution.

Under the opinion and decree of the Supreme Court of Tennessee, any employer can secure an injunction against peaceful picketing by labor organizations by simply alleging that the result as distinguished from the purpose of the picketing will be the increasing of prices to the consuming public of the employer's services or manufactured articles, or harmful to the business of the picketed employer, and obtain a blanket injunction against peaceful and truthful picketing and thus deprive citizens of the various states of their constitutional rights. It would be conceded under the opinion of the Supreme Court of Tennessee that any legitimate picketing by labor organiza-

tions would be for the purpose of achieving some betterment in their standard of wages, working conditions, fringe benefits or matters which would in all likelihood cause an increase in prices charged by the employer for his services or cause inconvenience or damage to the employer. The picketing would then become unlawful as being likely to increase the prices charged to the consuming public or do harm to the business being picketed. Does such holding not proscribe all picketing as denounced by this Court in **International Brotherhood of Teamsters, Local 695, v. Vogt, Inc.** (No. 77, decided June 17, 1957), wherein it was stated "State Courts, no more than State Legislatures, can enact blanket prohibitions against picketing?"

ARGUMENT.

QUESTION NO. 1.

1. May a state court, consistent with the First and Fourteenth Amendments, enjoin truthful and peaceful picketing where the purpose of the picketing is to advertise to the public that an employer is non-union and to persuade him to raise his prices for barbering services when wages are based on the cost of such services in order to preserve the economic advantages of higher pay and better working conditions for employees of the competing employer who is being picketed when such injunction is based on the proposition that the result of such picketing as distinguished from the purpose thereof will be that the consuming public will have to pay a higher price for the services of the employer being picketed, and that such picketing will cause damage to the picketed employer? Does this not constitute a blanket prohibition against picketing as condemned by this Court in **International Brotherhood of Teamsters, Local 695, v. Vogt, Inc.** (U. S. Supreme Court, No. 79, June 17, 1957); **A. F. of L. v. Swing**, 312 U. S. 321, and **Thornhill v. Alabama**, 310 U. S. 88?

To put the question in the light of the opinion of the Supreme Court of the State of Tennessee in this cause: Has the Supreme Court of the United States backed away from, overruled and nullified its holdings in **A. F. of L. v. Swing**, 312 U. S. 321; and **Thornhill v. Alabama**, 310 U. S. 88?

The Supreme Court of Tennessee can not constitutionally announce a public policy against all picketing. The question of state policy, if any, announced by the Supreme Court of Tennessee in this case or prior cases thereto, will be discussed in Question No. 2, infra.

A state court cannot consistent with the Fourteenth Amendment enjoin peaceful and truthful picketing when the purpose of said picketing is to maintain a favorable competitive position in the economic field by organized labor, although the result of said picketing may be to increase prices for haircuts, shaves, etc., or cause damage to the picketed employer.

The defendants in their sworn answer stated:

> "They are advised and the fore charge and aver that the earnings of barbers employed by complainant are much less than those of union barbers and therefore the union and its members have an interest therein for the reason that competition could and in all probability would have a detrimental effect upon the earnings of union barbers.
>
> "Defendants would show that for the reasons hereinabove set forth the defendant union has caused pickets to be placed at the barber shop of complainant which is located in an industrial area of the City of Memphis, inhabited by various members of union organizations, and that said picketing was conducted for the purpose of bringing to the attention of prospective customers of complainant the fact that said shop was and is being operated under non-union conditions."

The foregoing statement contained in the sworn answer of the defendant must be taken as true under Tennessee procedure.[5]

As to whether or not the picketing for the purpose set out in the quoted provision immediately hereinabove is legal, reference is made to this question having been determined by this Honorable Court in favor of the petitioners herein, in American Steel Foundries v. Tri-City

---

[5] See Footnote 4, supra.

C. T. Council, 257 U. S. 184, at page 209, thereof, Mr. Chief Justice Taft states:

> ". . . a single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth. The right to combine for such a lawful purpose has in many years not been denied by any court. The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint produce of labor and capital. **To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same Trade in the same community united, because, in the competition between employers, they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all lawful propaganda to enlarge their membership, and especially among those who labor at low wages will injure their whole guild.**" (Emphasis added.)

All the Supreme Court of the State of Tennessee had before it in deciding this case was the original bill of complainant and the sworn answer of the defendants, and under Tennessee practice and procedure, the respondent herein admits that every matter set up in the answer,

whether it is responsive to the bill or purely in avoidance, must be taken as true. This includes even those matters which the defendant avers that he believes and hopes to be able to prove, and matters which defendant neither admits nor denies will be deemed denied, and such denial must be taken as true.[6]

Therefore, the only matter the Supreme Court of the State of Tennessee had before it, and the only matter before this Court is as stated in **A. F. of L. v. Swing**, 312 U. S. 321, 325:

> "All that we have before us, then is an instance of 'peaceful persuasion', disentangled from violence and free from 'picketing en masse or otherwise conducted', so as to occasion 'eminent and aggravated danger'. Thornhill v. Alabama, 310 U. S. 88, 105, 84 L. Ed. 1093, 1104, 60 S. Ct. 736. We are asked to sustain a decree which for purposes of this case asserts as a common law of the state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him."
>
> "Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the bill of rights."

It is incumbent upon the court when a constitutional right such as the instant one has been asserted, to inquire not merely as to whether those rights have been denied in express terms, but also whether they have been denied in substance and effect. The court must review inde-

---

[6] See Footnote 4, *supra*.

pendently both the legal issues and those factual matters with which they are co-mingled. **Oyama v. California,** 332 U. S. 633. It is as appropriate for this Court to search the record to determine whether the crucial findings of law by a state court have a reasonable basis as it is to search the record to determine whether the findings of fact have such a basis.[7] Compare **Plumbers Union v. Graham,** 345 U. S. 192.

The writer of this petition frankly admits that the basis of the decision[8] of the Supreme Court of the State of Tennessee is obscure and in order to properly analyze and determine the holding, it is necessary to refer to the original bill of complaint and the answer, and in so doing it will be evident that the Tennessee Court has decreed a blanket prohibition against picketing.

QUESTION NO. 2.

"May a state court consistent with the First and Fourteenth Amendments, and particularly the due process clause of the Fourteenth Amendment, permanently enjoin peaceful and truthful picketing on findings of fact inconsistent with the record and under a state court procedure which does not permit the union to be heard or to introduce proof on the issue of the lawfulness of its conduct?"

In order to properly present to this Court the issue involved in Question No. 2, it will be necessary to generally

---

[7] "Since the case clearly presents a substantial claim of the right to free discussion and since, as we have frequently indicated, that right is to be guarded with a jealous eye, Herndon v. Lowry, 301 U. S. 242, 258, 81 L. ed. 1066, 1075, 57 S. Ct. 732; Schneider v. Irvington, 308 U. S. 147, 161, 84 L. ed. 155, 164, 60 S. Ct. 146; United States v. Carolene Products Co., 304 U. S. 144, 152, note, 82 L. ed. 1234, 1241, 58 S. Ct. 778, it would be improper to dispose of the case otherwise than on the face of the decree, which is the judgment now under review." A. F. of L. v. Swing, 312 U. S. 321, 325.

[8] Appendix A.

consider the Tennessee law, both as to the procedure that was had in this case, and the substantive law involved.

The economy of Tennessee has for many years been considered primarily an agricultural one, and, therefore, the Supreme Court of the State of Tennessee has had few occasions to consider and pass on the various intricate legal questions that arise from the interaction and competition between organized labor and management.

General Considerations.

The Supreme Court of Tennessee had before it in this cause and could look only to the original bill of complaint and the answer for a determination of the issues involved.

The bill of complaint, in substance, alleged that the Barbers Union was picketing the respondent for the purpose of forcing him to raise his prices for barbering services and to join the Barbers Union (R. 7, 8, 9). The answer of the petitioners to the original bill of complaint emphatically denied that the purpose of the picketing was for any purpose other than to advertise to the public the economic harm being caused employees of competing employers. The complainant then moved to have the cause disposed of on bill and answer. Under Tennessee practice and procedure, when the complainant in the Chancery Court moves for a disposition of the cause on bill and answer, the complainant thereby deprives the defendant of any opportunity to refute by proof the allegations contained in the original bill or to bring forward any new matter. Therefore, the Tennessee rule is that every matter set up in the answer, whether responsive to the bill or in avoidance, must be taken as absolutely true. This includes even those matters which the defendant avers that he believes and hopes to be able to prove, and all matters which the defendant neither admits nor denies, are deemed denied. This denial is conclusive.[9]

---

[9] See Footnote 4, *supra*

This procedure was followed in the instant case and the Supreme Court of Tennessee, under its own pronouncements of procedural and substantive law, was bound by the statement of fact contained in the answer filed by the petitioners. To hold otherwise would be a denial of both substantive and procedural due process of law under the Fourteenth Amendment to the Constitution of the United States. This is true because the petitioners were deprived of any opportunity to offer in proof evidence contradictory to the allegations of the original bill or to offer proof in avoidance of any such allegations. In the **Vogt case**, supra, this Court stated:

> "Of course, the mere fact that there is 'picketing' does not automatically justify its restraint without an investigation into its conduct and purposes. State courts, no more than state legislatures, can enact blanket prohibitions against picketing. Thornhill v. Alabama and A. F. L. v. Swing, supra."

Petitioners insist that the Supreme Court of the State of Tennessee by its conduct in disregarding the positive statement of fact contained in the answer of the petitioners deprive them of procedural due process under the Fourteenth Amendment to the Constitution of the United States.

(1) **Tennessee Public Policy.**

(a) **Legislative or Constitutional Authority.** A reference to the final opinion of the Supreme Court of Tennessee in this cause illustrates that the Supreme Court of Tennessee was not relying on any statutory or constitutionally declared public policy of the State of Tennessee. In fact, there is no reference in the opinion to the public policy of the State of Tennessee, either constitutional, statutory or judicial.

There is a reference in the final opinion of the Supreme Court of Tennessee to the Tennessee so-called right to

work statute[10], nevertheless there is no indication in the opinion that the Court is relying on a violation of the so-called right to work law under the facts contained in the original bill or the answer thereto. Reference is made to the following which is set out in the opinion of the Supreme Court of Tennessee:

> "The answer substantially admits the truth of the charges, that is, that complainant's place was picketed by members of the union, and that certain 'union barbers individually have prevailed upon the Memphis Linen Supply Company to refuse to deliver said supplies to the complainant'; that in so doing they were acting lawfully." (Appendix A.)

Following this in the opinion of the Supreme Court of Tennessee, there is the general statement that this admission by the petitioners herein might constitute a violation of the state's right to work law. However, this Honorable Court is directed to the pleadings for a correct statement of the above which was quoted out of context. The answer of petitioners from which the above quotation was purportedly taken shows:

> "Defendants deny that the Barbers Local Union through its officers or members have prevailed upon the Memphis Linen Supply Co. to refuse to deliver necessary laundry and barber supplies to the complainant, but aver that if union barbers individually have prevailed upon the Memphis Linen Supply Co. to refuse to deliver said supplies to the complainant, that the right to do so is lawful and not actionable at law or in equity."

It will be noted that in the quotation contained in the opinion of the Supreme Court of Tennessee, that the words **"but if"** have been left out, and that the words

---

[10] Copied in full in Appendix "D". This statute is directed toward the employer. Duke v. Local Union No. 437 et al., 191 [illegible] 405 499 (1950).

"but if" make all of the difference in the interpretation placed upon that paragraph by the Supreme Court of the State of Tennessee. There is an emphatic denial by the defendants in the answer that the barbers local union or its authorized officers or agents have prevailed upon the Memphis Linen Supply Company to refuse to deliver the necessary laundry and barber supplies to the complainant. This denial must be taken as fact under the procedural rules[11] of the State of Tennessee.

Therefore, there is no substantial finding of fact that the picketing in the instant case was in any way, or could be in any way, violative of the Tennessee so-called right to work law. It is submitted that any picketing will, if effective, bring a certain amount of pressure upon those doing business with the person being primarily picketed, but that this is a result of the economic conflict involved in labor management relations, and cannot constitutionally be banned by a state court under the Federal Constitution. Therefore, no statutory public policy of the State of Tennessee was violated by the conduct of the petitioners herein. (See, Original Majority Opinion Appendix "B".)

At the very time the Supreme Court had under advisement (February 15 to May 3, 1957), the petition for a rehearing in this cause, the legislature of the State of Tennessee was in session. During this session, a number of anti-picketing bills and resolutions were introduced. One of such resolutions was designated as Senate Joint Resolution No. 77[12]. This Senate Joint Resolution No. 77 sought to establish as the public policy of the State of Tennessee that stranger picketing was illegal. This resolution was not adopted. At about the same time and on February 26, 1957, and while the petition to rehear in this cause was under consideration by the Supreme Court of

---

[11] See Footnote 4, supra.

Tennessee, a bill was introduced in the House of Representatives in the State of Tennessee[13] providing "That picketing in labor disputes by any person not an employee of the employer who is or which is a party to the labor dispute is declared to be a misdemeanor." This bill, likewise, was defeated. On January 21, 1957, a bill restricting picketing and declaring the public policy of the State of Tennessee was introduced in the Senate of the General Assembly of the State of Tennessee, and known as Senate Bill No. 98[14]. This bill would have also outlawed so-called stranger picketing and severely restricted the exercise of other rights deemed important to labor. This bill likewise was defeated by the State Legislature. Therefore, the decision of the Supreme Court of the State of Tennessee in this cause is not referable to any constitutional or legislative pronouncement of public policy. (See, Original Opinion Appendix "B".)

(b) **Court Decisions.**

The decisions of the Supreme Court of the State of Tennessee do not establish a public policy upon which the decision in the instant case can be sustained. (See Original Opinion (Appendix "B").

The Supreme Court of the State of Tennessee quotes from **Bailey v. Master Plumbers**, 103 Tenn. 99, 100 (1899). Then in the opinion of the Supreme Court the following quotation is made:

> "The courts, with practical unanimity, hold that contracts, agreements, arrangements or combinations in whatever form or name, are contrary to public policy and void when they tend to impair competition in trade and to enhance prices to the injury of the public."

---

13 Printed in full in Appendix "F".

14 Printed in full in Appendix "G".

The Supreme Court of Tennessee made no findings, nor does the record support any contention that the union in this case was doing anything other than "competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars, or by his window display." Therefore, if the Supreme Court of Tennessee intended to announce a public policy based upon the evidence in this cause and the statement quoted, it is concluded that such policy could not stand in the face of the First and Fourteenth Amendment to the Constitution of the United States since it would ban all picketing contrary to the Vogt case, supra. Compare **American Steel Foundries v. Tri-City C. T. Council**, 257 U. S. 184, 209.

As stated hereinabove the State of Tennessee has for many years been considered primarily one with an agricultural economy and the highest court of this state has had few opportunities to consider the grave and complex questions involving the basic liberties of individuals and labor organizations guaranteed by Federal law in the competition between labor and management for their respective shares of economic benefits. The opinion of the Supreme Court of the State of Tennessee (printed in full in Appendix A) seems to base its entire holding in this case on that of **Lyle v. Meatcutters**, 174 Tenn. 222 (1939). In the **Lyle case**, *supra*, at page 228, the Court stated:

> "The Court is not concerned as to the wisdom or policy of this character of litigation; that being a question for the lawmaking body of the state. The duty of the Court is simply to declare the law as it exists and not as it should be.
>
> "There is no subject about which more has been written than that of the rights, privileges and immunities of organized labor. The subject of injunctive relief against boycott picketing is regulated in many

states by statute. **In this state there is no statute dealing with this matter, and this Court has not heretofore been called upon to decide a controversy of this nature.**" (Emphasis added.)

The facts in the **Lyle case** were that the union was picketing an employer who had no employees for the admitted purpose of forcing the employer to join the union. The Court held unequivocally that:

> ". . . that when necessary to prevent irreparable injury, an injunction will be granted to prevent third persons, who are not employees and have no contractural relations with the employer, from picketing or destroying his business by so-called peaceful picketing. Some of these cases rest upon the theory that such picketing amounts to a nuisance, and as such will be enjoined."

Therefore, if the opinion of the Supreme Court of Tennessee in this case was based entirely on the **Lyle case**, *supra*, which it seems to be, the injunction was issued because, and only because, Tennessee supposedly had a blanket public policy proscribing "stranger" picketing. And any and all picketing, regardless of the purpose or intent of the picketing, would be enjoined on that basis. This is the exact conduct prohibited in **Swing, Thornhill** and **Vogt.**

In the **Lyle case**, *supra*, the Supreme Court of Tennessee stated at page 230:

> "In this particular cause complainant alone was conducting his meat market when defendants began picketing his place of business because he would not join the butchers' union. This does not constitute a labor dispute."

The next case considered by the Supreme Court of Tennessee dealing with picketing and the rights of organized

labor to bring economic pressure on the employer was that of **Rowe v. International Brotherhood**, 186 Tenn. 265 (1947). In the **Rowe** case the Supreme Court of Tennessee, in analyzing its holding in the **Lyle** case, supra, stated:

> "When our case of Lyle v. Meatcutters & Butchers, 174 Tenn. 222, 124 S. W. 2d 701, 704, is given that construction most favorable to employers, its holding is (1) 'when necessary to prevent irreparable injury, an injunction will be granted to prevent third persons, who are not employees and have no contractual relations with the employer, from injuring or destroying his business by so-called peaceful picketing. Some of these cases are rested upon the theory that such picketing amounts to a nuisance and as such will be enjoined.' (2) Picketing of one's place of business is unlawful in the absence of a labor dispute."

Again, at page 269 of the **Rowe** case, the Court states:

> "Lyle v. Meatcutters & Butchers, supra, was decided in 1939. Thereafter, in 1941, the United States Supreme Court in the case of American Federation of Labor v. Swing, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855, held that peaceful picketing is included in and a part of that freedom of speech guaranteed by the Fourteenth Amendment to the Constitution of the United States; that, therefore, an injunction against such peaceful picketing, either pursuant to the common law or statutory policy of the state, violates this provision of the Federal Constitution.
>
> "The decision of the Supreme Court of the United States as to whether a certain act, decree or law violates the Constitution of the United States is binding upon the state courts. We, therefore, must conclude that an injunction against peaceful picketing, nothing else appearing, is a violation of the Fourteenth Amendment of the United States Constitution, and

that Lyle v. Meatcutters & Butchers, supra, insofar as it may by necessary implication hold to the contrary, is no longer the law by reason of the subsequent decisions of the Supreme Court of the United States."

In **Ira A. Watson Co. v. Wilson et al.**, 187 Tenn. 402, the Supreme Court of Tennessee unequivocally held that peaceful picketing is lawful without the presence of a labor dispute. And further, that peaceful picketing cannot be enjoined even though such picketing results in injury to the employer.

The Court stated in the **Watson** case at page 404:

"Can a union peacefully picket a place of business where it has no members at all (and does not seek or hope to have any) simply for the purpose of inducing potential customers to not patronize such establishment?"

This question was answered in the affirmative at page 405 of the **Watson** case as follows:

"As announced by the United States Supreme Court the rule is that peaceful picketing is lawful without a labor dispute, and supersedes our holding in the Lyle case, supra.

" . . . (T) then it cannot be enjoined even though in doing so injury results to the employer."

The next case decided by the Supreme Court of the State of Tennessee dealing with picketing and free speech was the one under consideration. Therefore, it will be seen that there have been only about four cases decided by the Supreme Court of the State of Tennessee dealing with the respective rights and privileges of employers and employees in the free speech area.

The State of Tennessee, speaking through its constitution, its legislature or its judicial branch, has established no public policy making peaceful and truthful picketing by non-employees of the picketed employer contrary to

the public policy of the State of Tennessee.[15] The foregoing statement is true unless it is assumed that the opinion by the Supreme Court of Tennessee in the case under consideration so establishes such public policy. The writer of this petition would like to especially point out that at the very time of the consideration of this case by the Supreme Court of Tennessee the State Legislature was rejecting bills and resolutions which would establish public policy of Tennessee on this point. Further, that in the **Lyle case**, *supra*, that the Supreme Court of Tennessee stated that the matter of public policy dealing with this situation was within the province of the State Legislature.

(c) **The Facts of This Case.**

Under Tennessee practice and procedure[16] the Supreme Court of the State of Tennessee has made no finding of fact upon which to base its decision in this case. On the contrary, by its very rules of procedure as established and set out in court decisions, every allegation contained in the answer filed by these petitioners must be taken as true and the answer adequately and affirmatively sets up that the only purpose of the picketing was to advertise to the public that the low wages paid by the respondent, his working hours and conditions, were detrimental to organized labor in Memphis, Tennessee. Under the decision and the decree of the Supreme Court of the State of Tennessee, no employer is subject to being picketed regardless of the purpose of such picketing if such picketing brings economic pressure upon the employer and affects or hurts his business. That is the holding of the State Supreme Court. The concluding paragraph of the opinion of the Supreme Court of Tennessee so clearly demonstrates the truth of the foregoing statement, wherein it is stated:

---

[15] Nor could such public policy constitutionally be announced if there is a breath of life remaining in the Swing or Thornhill cases.

[16] See Footnote 4, *supra*.

"We do not wish to be understood as holding that members of the union are forbidden the right to peacefully picket for a lawful purpose. The actions of the defendant, however, as disclosed in the answer, portrayed a situation which, if continued, would result in depriving complainant of the right to carry on a lawful business."

The gratuitous statement of the Supreme Court of Tennessee in the first sentence of the preceding quotation is immediately retracted and rendered meaningless by the remainder of what follows. There can be no picketing at any time in the normal course of events that does not result in damage, loss of customers, etc., to the business being picketed when such business is located in an area inhabited by members of organized labor. The first sentence of the foregoing quotation sought to bring the instant case within the doctrine of **Giboney** and **Gizzam**, *supra*. Yet on sound analysis, the remainder of the quote immediately removes this case from **Giboney** and **Gizzam** and places it squarely within the **Thornhill, Swing** and **Vogt** cases, **and will result in every trial court in the State of Tennessee proscribing all picketing until this case is reversed.**

Any picketing, newspaper advertising, window display or other means of communication in the business world does result in and affect the business of others. In fact economic, competition and advertising campaigns result daily in "depriving complainant (competing businesses) of the right to carry on a lawful business." This, however, is deemed a proper exercise of freedom of speech, of press and assembly. But if done by organized labor for the same purpose, it is deemed an act subject to the injunctive processes of the state court. It is submitted that the First and Fourteenth Amendments were not intended to guarantee freedom of speech, press and assembly to those who had a place to speak, owned a newspaper or a building in which to assemble.

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted and the Supreme Court of Tennessee summarily reversed.

Respectfully submitted,

Cecil D. Branstetter

CECIL D. BRANSTETTER,
104 Stahlman Building,
Nashville, Tennessee,
Attorney for Petitioners.

MOORE, CROWNOVER, BRANSTETTER & FOLK,
104 Stahlman Building,
Nashville, Tennessee,

ROBERT A. TILLMAN, Esq.,
81 Madison Building,
Memphis 3, Tennessee,
Of Counsel.

Dated July 18, 1957.

Certificate of Service.

I, Cecil D. Branstetter, attorney for petitioners herein, and a member of the Bar of the Supreme Court of the United States hereby certify that copies of the foregoing Petition for Certiorari and Appendices were this day served on adverse parties here in accordance with Supreme Court Rules 21 (1) and 33 by depositing the same in the U. S. Post Office at Nashville, Tennessee, with first class air mail postage prepaid addressed to counsel of record at his post office address, as follows:

Ulysses Burgess, Esq., Attorney at Law, Madison Building, Memphis Tennessee, and Robert L. Taylor, Esq., amicus curiae, 208 Adams Avenue, Memphis, Tennessee.

July 24, 1957.

Cecil D. Branstetter

Cecil D. Branstetter.

APPENDIX A.

L. A. Flatt
v.
Barbers' Union, etc., et al.

Shelby Equity.
Hon. Ceylon B. Frazer, Chancellor.

For Appellee (Complainant):
Ulysses Burgess and Taylor,
Costen & Taylor,
Memphis, Tennessee.

For Appellants (Defendants):
Robert A. Tillman,
Memphis, Tennessee.

On Petition to Rehear.

The complainant in the court below, and appellee herein, has filed a petition to rehear complaining that the Court erred in reversing the Chancellor's decree. The Chancellor heard the cause on bill and answer and issued a permanent injunction restraining members of the Barbers' union from picketing the complainant's place of business.

Upon a full consideration of the record, and our opinion responding to appellants' assignments of error, we feel that the petition to rehear should be granted. It is so ordered and the decree of the Court heretofore entered is set aside and for nothing held.

The majority of the Court, upon further consideration of the issues presented, are of opinion that the Chancellor was not in error in issuing the permanent injunction complained of.

Contention was made on the original hearing that when a cause is heard on bill and answer the answer must be taken as true; that the defendant's denial in its answer that picketing the complainant's place of business was not

intended to compel him to join the Barbers' Union. But its purpose was to induce him to "raise his prices for work."

The original bill, however, charged that defendants (Barbers' Union, Local No. 136, and certain named individual members) "have for several months been trying to force him to join the local barber's union and raise his prices for barbering 25%," etc., and that he has refused to do so; that for some months prior to filing the present bill the defendants had one and two pickets walking back and forth on the sidewalk in front of his home and shop, carrying printed signs to this effect, "This Shop is Unfair to the Barbers' Union." At the time the present bill was filed "two men were walking in front of his home and shop" carrying the same printed sign. It is further charged in the bill:

> "The said Barbers' Union, local 136, thru their officers or members, have prevailed upon the Memphis Linen Supply Company in Memphis to refuse to deliver necessary laundry and barber's supplies to the complainant, in an effort to force and hurt complainant's barber business.
>
> "That now said Memphis Linen Supply Company fails and refuses to deliver to complainant any towels or other barber supplies, solely on the grounds that the said barbers union has threatened not to patronize them, but to withdraw all of their business therefrom unless they would not deliver any goods to or do any business with this complainant."

We now consider the answer to the foregoing charges, which appellants say must be accepted as true.

The answer substantially admits the truth of the charges, that is that complainant's place was picketed by members of the union, and that certain "union barbers individually have prevailed upon the Memphis Linen Sup-

ply Company to refuse to deliver said supplies to the complainant"; that in so doing they were acting lawfully.

There follows a categorical denial that defendants have at any time intended, by their acts, to "force complainant to join the union." There are other statements made in the answer which are not relevant to the present issue, such as efforts made by the defendants to raise standards and prices.

We feel that the answer is conclusive of the charge in the bill, that the defendants and associated members of the union are attempting to put the complainant completely out of business unless he complies with their demands. As a result of continued picketing, and actions in prevailing upon the Memphis Linen Supply Company not to furnish complainant any barber supplies, it is not profitable for him to continue in business. Moreover, the signs carried by defendants' pickets are to prevail upon the public to cease patronizing the complainant on the ground that he is a non-union barber.

There appears in the answer this following statement: "They (defendants) aver that the right to bestow or withhold patronage from any firm or person for any reason satisfactory to themselves is lawful and not actionable at law or in equity." While they are privileged to patronize whomsoever they please, they cannot by force and intimidation deny to others a free choice. It is contrary to our "Right to Work" statute, 50-208, T. C. A., as well as the holding of this Court in **Bailey v. Master Plumbers**, 103 Tenn. 99, 100, wherein it is said:

> "The Courts, with practical unanimity, hold that contracts, agreements, arrangements or combinations in whatever form or name, are contrary to public policy and void when they tend to impair competition in trade and to enhance prices to the injury of the public."

In **Lyle v. Meat Cutters & Butchers**, 174 Tenn. 222, 229, 230, the Court holds (supported by a vast array of authorities):

> "Most of these decisions are based upon the principle that the right to conduct a lawful business is a property right, protected by the common law and guaranteed by the organic law of the State; and that when necessary to prevent irreparable injury an injunction will be granted to prevent third persons, who are not employees and have no contractual relations with the employer, from injuring or destroying his business by so-called peaceful picketing. Some of the cases are rested upon the theory that such picketing amounts to a nuisance, and as such will be enjoined.
>
> "The general rule, supported by many decisions, both State and Federal, is stated in 32 C. J., 155, as follows:
>
> " 'Since the right to carry on a lawful business without obstruction is a property right, acts committed without just cause or excuse, which interfere with the carrying on of complainant's business and destroy his custom, his credit, or his profits, do an irreparable injury and authorize the issuance of an injunction.' "

We do not wish to be understood as holding that members of a union are forbidden the right of peaceful picketing for a lawful purpose. The actions of the defendant, however, as disclosed in the answer, portray a situation which, if continued, would result in depriving complainant of the right to carry on a lawful business.

Upon full consideration of the foregoing authorities, we are constrained to overrule the assignments of error. The decree of the Chancellor is affirmed.

Neil, C. J.

Prewitt, Tomlinson and Burnett, J. J., concur.
Swepston, J., dissents.

APPENDIX B.

L. A. Flatt
v.
Barbers' Union. } Shelby Equity.

Opinion.

This case was heard on bill and answer and comes to us on direct appeal.

The bill in this case alleges that the complainant Flatt is a non-union barber and that for several months the defendant Union has been trying to force him to join the local Barbers' Union and raise the prices of his barbering services but that he is not willing to do either one and has refused to do so; that last fall and winter the defendant Union had one and two pickets walking back and forth on the sidewalk in front of his combination home and shop, carrying signs, "This shop is unfair to the Barbers' Union"; that there is no strike or other known cause for their acts except to force him to comply with their wishes; that the sole purpose is to intimidate, coerce and force complainant to comply with their will and that he will suffer great loss, damages and injury if they are not restrained.

Further, that the Union through its officers and members have prevailed upon the Memphis Linen Supply Company to refuse to deliver necessary laundry and barber supplies to him in an effort to hurt his business, and to that end they have threatened not to patronize said Linen Supply Company and to withdraw all their business therefrom.

The answer denied that the Union or any of its officers have been trying to force complainant to join the Union. It is admitted that for a time last fall the Union placed

pickets on the sidewalk as alleged but deny that the sign read as alleged and state that the sign read, "This shop does not employ union barbers." It is denied that the Union had more than one picket at a time in front of the place of business, or that said picketing was continuous but only occurred from May 7 to May 11, 1956, and on May 19, 1956. It is further denied that they have sought to force complainant to join the Union, but have only sought to have the complainant and the three barbers, whom he employs, to observe the minimum standards provided for in the contracts between defendant Union and competitors of complainant; they deny that the Union had ever insisted that complainant employ union barbers or that he discharge any of his present employees and deny that they ever insisted upon any of his said employees joining the Union.

It appears from the bill and answer that the respective prices charged by the complainant are less than the prices charged by the Union shops.

The answer denies that the Union through its officers or members have prevailed upon the Linen Supply Company to refuse to do business with the complainant.

Since the hearing was on bill and answer the statements of fact in the answer must be taken as true.

This is another case of so-called "stranger picketing," as in another case this day decided, that is Pruitt v. Lambert. The Chancellor was of opinion that the injunction should issue for the reason that, as he viewed the matter, the Supreme Court has felt compelled to back away from its "tenuous" holding in A. F. of L. v. Swing, 312 U. S. 321, wherein the Court declared unequivocally that peaceful picketing was no more than the exercise of free speech guaranteed by the Constitution of the United States and that the same could not be enjoined. The basis of his view

was predicated on the decisions in Gibony v. Empire Storage & Ice Co., 335 U. S. 498, and the other cases cited in the opinion in the above referred to Pruitt v. Lambert case. He quoted copiously from Chucales v. Royalty (Ohio, Oct. 26, 1955), 129 N. E. 2d 823, 826, which opinion cites all of the cases above referred to and many more.

He was further of the opinion that our cases of Rowe Transfer & Storage Co. v. International Brotherhood, 186 Tenn. 265, and Watson Co. v. Wilson et al., 187 Tenn. 402, declined to follow our case of Lyle v. Meat Cutters & Butchers (1939), 174 Tenn. 222, because the Court felt constrained to bow to the superior force of the Swing decision, while not retreating from the declaration of the law and public policy of the State of Tennessee is that which is declared by this Court in the Lyle case.

With deference to the able Chancellor we are not able to go all the way on this view which he entertains. While it is conceded by both counsel in this case and so stated by another able lawyer, the Honorable Thorlow Smoot, whose article appeared in the September issue of the American Bar Journal, that picketing may be enjoined if the objective of the picketing is held by a State Court to be against the policy of the State, either as shown by a statute or as determined by that Court, yet it must be remembered that the State policy so declared by statute or common law must itself not be violative of the Federal Constitution. Hence, if we say that peaceful picketing under the Swing and the Thornhill cases is but the right of free speech, and no case has held otherwise since those two cases were decided, then we cannot say that strictly peaceful picketing by strangers can be enjoined because of the public policy formerly announced in the Lyle v. Meat Cutters & Butchers case.

Accordingly, it seems to us and we so hold that as the instant case is presented on the bill and answer it presents

a simple case of peaceful picketing for advertising or persuasive purposes just as was the situation in Watson Co. v. Wilson et al., supra, and that the Chancellor was in error in issuing the injunction in this case.

Let the decree below be reversed and the costs against the appellee.

Neil, C. J., dissents.

/s/ John E. Swepston,
John E. Swepston, J.

APPENDIX C.

Minutes of the Supreme Court, Minute Book 44, Page 913.

L. A. Flatt v. Barbers' Union, etc., et al.	Shelby Equity. Petition Granted; Chancellor Affirmed.

This cause coming further to be heard upon a petition to rehear upon consideration of all of which the Court is pleased to grant the petition and the decree heretofore entered is set aside and for nothing held.

It is therefore ordered and decreed by the Court that the decree of the Chancellor be affirmed, and that the defendants George McNamara, J. P. Osborne, Tinto O. Masner, Lee Saxton, I. C. Crawford and the Journeymen Barbers' Local Union No. 36 be and they are hereby forever and perpetually enjoined from picketing or otherwise obstructing or interfering with complainant's barber shop and home located at 1329 North Hollywood, Memphis, Tennessee.

This cause is remanded to the Chancery Court of Shelby Court for the enforcing of this decree and the collection of the costs below for all of which let procedendo issue.

The costs of this appeal will be paid by the Barbers' Union of Memphis, Local 36 and others, principals, and Robert A. Tillman, surety, for which let execution issue. 5/3/57

APPENDIX D.

"So-Called Right to Work Law."

Section 50-208 et seq. of the official Tennessee Code.

"50-208. **Denial of employment because of affiliation or nonaffiliation with labor union unlawful.**—It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind.

"50-209. **Contracting for exclusion from employment because of affiliation or nonaffiliation with labor union unlawful.**—It shall be unlawful for any person, firm, corporation or association of any kind to enter into any contract, combination or agreement, written or oral, providing for exclusion from employment of any person because of membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind.

"50-210. **Exclusion from employment for payment of or failure to pay union dues unlawful.**—It shall be unlawful for any person, firm, corporation or association of any kind to exclude from employment any person by reason of such person's payment of or failure to pay dues, fees, assessments, or other charges to any labor union or employee organization of any kind.

"50-211. **Application of preceding sections.**—The provisions of §§ 50-208—50-212 shall not apply to any lawful contract in force on February 21, 1947; but shall apply in all respects to contracts entered into thereafter, and to any renewal or extension of any existing contract."

APPENDIX E.

Senate Joint Resolution No. 77.
By Dodson.

Whereas, The fundamental American Rights of freedom of speech and assembly and the right to strike and the safety and general welfare of the people and their right to engage in their daily pursuits without unlawful interference from others must be preserved; and

Whereas, Stranger picketing or the picketing by non-employees of any establishment where there is no labor dispute between an employer and a majority of the employees tends to create discord and disrupt harmonious labor relations as well as inflict damage and inconvenience to the general public and infringes the so-called right to advertise; and

Whereas, It is a matter of public knowledge that labor disputes have been in many cases attended by force, violence, coercion, mass picketing and conduct otherwise dangerous to the health, safety and general welfare of the people of Tennessee and that no definite statewide standard or yardstick has been fixed to determine when lawful picketing ceases and unlawful picketing commences;

Now, Therefore, Be It Resolved by the Senate of the Eightieth General Assembly of the State of Tennessee, the House of Representatives Concurring, That picketing, which constitutes or forms any character or obstacle to the free ingress to and egress from any entrance to any premises, either by obstructing said free ingress or egress by their persons or by placing of vehicles or other physical obstruction is hereby declared to be against the public policy and general welfare of the State of Tennessee.

Be It Further Resolved, That the picketing of any establishment by persons other than the employees or former employees of the employer involved is hereby declared to be against the public policy and general welfare of the State of Tennessee.

Be It Further Resolved, That the picketing of any place where there is no labor dispute between an employer and the majority of his employees, or the picketing for a secondary boycott is hereby declared to be against the public policy and general welfare of the State of Tennessee.

APPENDIX F.

House Bill No. 597 (PIk 2-26-57)

By
Morris Puckett
Padgett Baird
Atchley
Nease.

AN ACT to declare picketing in labor disputes by any person not an employee of the employer who is or which is a party to the labor dispute to be a misdemeanor, and to fix penalties for the violation of the provisions hereof.

Section 1. Be It Enacted by the 80th General Assembly of Tennessee, That picketing in labor disputes by any person not an employee of the employer who is or which is a party to the labor dispute is declared to be a misdemeanor.

Section 2. Be It Further Enacted, That any violation of the provisions of this Act shall be punished by a fine not to exceed five hundred dollars ($500.00) or imprisonment in the County jail or workhouse for a period of time not to exceed eleven months and twenty-nine days, or both, in the discretion of the Court.

Section 3. Be It Further Enacted, That this Act shall take effect from and after its passage, the public welfare requiring it.

APPENDIX G.

Senate Bill No. 98 (PIR 1-21-57)
by
Dodson.

AN ACT to define and regulate picketing within the State of Tennessee, and to fix penalties for the violation of this Act.

PREAMBLE.

The fundamental American rights of freedom of speech and assembly and the right to strike and the safety and general welfare of the people and their right to engage in their daily pursuits without unlawful interference from others must be preserved.

It is a matter of public knowledge that labor disputes have been in many cases attended by force, violence, coercion, and conduct otherwise dangerous to the health, safety and general welfare of the people of Tennessee and that no definite state-wide standard or yardstick has been fixed to determine when lawful picketing ceases and unlawful picketing commences; therefore

Section 1. Be It Enacted by the General Assembly of the State of Tennessee, That the purpose of this Act is to preserve tranquility among the citizens of this state and to insure the unobstructed production and distribution of the products of our factories and fields, and for the continued protection and preservation of our democratic way of life and for the general welfare of the people of this state and this Act shall be known as The Right to Lawful Picket Act.

Section 2. Be It Further Enacted, That as used in this Act:

a. The term "labor union" means every association, group, union, national and local, branch or subordinate organization or any union of working men, incorporated or unincorporated, organized and existing in part for the purpose of protecting themselves and improving their working conditions, wages, or employment relationships in any manner, and shall include the local, state, national and international affiliates of such organizations or union.

b. The term "labor dispute" is limited to and means any controversy, concerning a lawful objective, between an employer and the majority of his employees in an appropriate bargaining unit concerning wages, hours, or conditions of employment; provided that if any of the employees are members of a or represented by a labor union, a controversy between such employer and a majority of the employees belonging to or represented by such union, concerning wages, hours or conditions of employment, shall be deemed, as to the employees who are members of or represented by such union, a labor dispute within the meaning of this Act.

c. The term "picket" shall include any person stationed at any premises involved in a "labor dispute", as that term is defined in this Act, by or acting in behalf of any organization for the purpose of peacefully inducing anyone not to enter the premises involved, or for peacefully apprising the public by signs, banners, or other means of the existence of a labor dispute at or near the premises in question or to observe the premises involved so as to ascertain who enters or patronizes the same.

Section 3. Be It Further Enacted, That each employee and all employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or pro-

tection, and shall also have the right to refrain from any or all of such activities, but no person, labor union or organization or association of labor or management or otherwise may use strength, force or action, economic or otherwise, which can have the effect, directly or indirectly, or tend to interfere with, restrain, or coerce employees in their right to freedom of self-organization and right of individual choice and election as set forth in this Act.

Section 4. Be It Further Enacted, That nothing in this Act, except as specifically provided for herein, shall be construed as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right, in respect to wages, hours or other conditions of employment when a labor dispute, as defined herein, exists.

Section 5. Be It Further Enacted, That it shall be unlawful for any person by force, violence, or coercion, or threat of force or violence or insulting, threatening or obscene language, to prevent or attempt to prevent any person from exercising his right to engage in a labor dispute or picket during the course of a labor dispute, as the terms are defined in this Act, or freely engaging in the exercise of his lawful right to work or to enter upon the performance of any lawful vocation or from freely entering or leaving any premises.

Section 6. Be It Further Enacted, That it shall be unlawful for any person, singly or in concert with others, to engage in picketing or any form of picketing activity that shall constitute "mass picketing" as defined in this Act.

"Mass picketing," as that term is used herein, shall mean any form of picketing in which:

a. There are more than two (2) pickets at any time within either fifty (50) feet of any entrance to the premises being picketed, or within fifty (50) feet of any other picket or pickets.

b. Pickets constitute or form any character of obstacle to the free ingress to and egress from any entrance to any premises, either by obstructing said free ingress or egress by their persons or by the placing of vehicles or other physical obstructions.

Section 7. Be It Further Enacted, That it shall be unlawful for any person to picket in an unlawful manner, or picket or induce others to picket the establishment, supply or delivery vehicles, or customers of any person, firm or corporation engaged in business, or to in any manner interfere with any person or persons desiring to transact business with any person, firm or corporation engaged in business, when no "labor dispute" exists between such employer and his employees or their representatives.

Section 8. Be It Further Enacted, That it shall be unlawful for any person singly or acting in concert with one or more other persons to assemble at or near any place where a "labor dispute" exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation or for any person acting either by himself or as a member of any group or organization or acting in concert with one or more other persons to promote, encourage, or aid any such unlawful assemblage or to loiter about the scene of a "labor dispute."

Section 9. Be It Further Enacted, That it shall be unlawful for a labor union, its agents, members or any employees to engage in, or to induce or encourage the employees of any employer to engage in, a strike or picketing or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object of any strike, picketing or concerted refusal is: (a) forcing or requiring any employer or self-employed person or any

person to join any labor or employer organization or labor union or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (b) forcing or requiring any other employer to recognize or bargain with a labor union as the representative of his employees unless such labor union establishes that it represents a majority of employees in an appropriate bargaining unit; (c) forcing or requiring any employer to recognize or bargain with a particular labor union as the representative of his employees if another labor union has established that it represents a majority of employees in an appropriate bargaining unit; (d) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor union or in another trade, craft, or class, unless such employer is failing to recognize a labor union or organization which represents a majority of employees in an appropriate bargaining unit.

Section 10. Be It Further Enacted, That this Act shall be construed in connection with the provisions of the Tennessee Law, known as the Right-to-Work Law, embodied in sections 50-208 to 50-211 (inclusive) of the Tennessee Code effective January 1, 1956.

Section 11. Be It Further Enacted, That the provisions of this Act shall be cumulative of all other existing laws of the State of Tennessee; and, in the event of a conflict between existing laws and the provisions of this Act, then and in that event the provisions, offenses, and punishments set forth herein shall prevail over any existing law.

Section 12. Be It Further Enacted, That any person, firm or corporation who violates any of the provisions of this Act shall be liable to any person, firm or corporation

suffering the same for all damages resulting therefrom, and the person, firm or corporation damaged is hereby given a right of action and access to the Circuit and Chancery Courts of this state to redress such wrong or damage, including injunctive relief; and any association or labor union, local, state, national or international, which represents or purports to represent any such person violating any of the provisions of this Act shall be jointly and severally liable with any such person for all such damages resulting thereby. The Circuit and Chancery Courts of this State are also vested with power and authority to make and determine any findings of fact in any civil proceeding which may be required under this Act and to administer and enforce this Act in any civil proceeding.

Section 13. Be It Further Enacted, That the State of Tennessee, through its Attorney General or any District or County Attorney, may, in addition, institute a suit in any Circuit or Chancery Court to enjoin any person, association or persons, labor union, firm or corporation, or any officer, agent, servant or employee of such person, association of persons, labor union, firm or corporation, from violating any provision of this Act.

Section 14. Be It Further Enacted, That any person who shall violate any of the provisions of this Act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding Five Hundred ($500.00) Dollars and by confinement in the county jail not to exceed six months.

Section 15. Be It Further Enacted, That if any clause, sentence, paragraph or part of this Act or the application of this Act, to any person or circumstances, shall for any reason be adjudged to be unconstitutional or void, such judgment shall not affect, impair or invalidate the remainder of this Act and the application thereof, it being

the expressed intention of the General Assembly of the State of Tennessee, now here declared, that this Act would have been enacted if such unconstitutional or void matter had not been included herein.

Section 16. Be It Further Enacted, That this Act take effect from and after its passage, the public welfare requiring the same.

Office - Supreme Court, U.S.
FILED
SEP 13 1957
JOHN T. FEY, Clerk

SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 321

BARBERS UNION OF MEMPHIS, LOCAL NO. 36, GEORGE McNAMARA, Secretary of Local No. 36; J. P. OSBORNE; TINTO O. MASNER; and LEE SAXON, Petitioners,

vs.

L. A. FLATT, Respondent.

BRIEF OF L. A. FLATT IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Robert L. Taylor
208 Adams Avenue
Memphis, Tennessee

Newell N. Fowler
81 Madison Building
Memphis, Tennessee
Counsel for Respondent.

Ulysses Burgess,
81 Madison Building,
Memphis, Tennessee,
Of Counsel

INDEX

Question Presented 1

Statement of the Case 2

Argument 3

Right to Work Statute 3

Combination to Impair Competition and Enhance Prices 7

Conclusion 8

Certificate of Service 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 321

BARBERS UNION OF MEMPHIS, LOCAL NO. 36, GEORGE McNAMARA, Secretary of Local No. 36; J. P. OSBORNE; TINTO O. MASNER; LEE SAXTON; and I. C. CRAWFORD, Petitioners,

vs.

L. A. FLATT, Respondent.

BRIEF OF L. A. FLATT IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Question Presented

May the Supreme Court of Tennessee enjoin peaceful picketing upon finding that the objective of such picketing is "to put the complainant (employer) completely out of business unless he complies with their (the Union's) demands" that he "join the local barbers' union and raise his prices for barbering 25%" in violation of the State's public policy as set forth in its "Right to Work" statute and in judicial decisions prohibiting combinations which "tend to impair competition in trade and to enhance prices to the injury of the public"?

No question of interstate commerce is involved.

Statement of the Case

Petitioners' statement of the case is substantially accurate and complete except insofar as it discusses the effect of a hearing on bill and answer under Tennessee procedure (page 10, note 4, petitioners' brief). Petitioners fail to point out that "legal deductions insisted on in the answer" are not admitted as true. The significance of this rule in the disposition of this case by the Supreme Court of Tennessee will be discussed hereinbelow.

Briefly stated, the facts in this case are as follows:

For several months, members of the local barbers' union in Memphis attempted to induce the respondent, Flatt, to join the union and to maintain union working conditions in his shop where he employed three barbers none of whom were members of the union. Respondent, who worked along side of his three employees, declined to join the union and to raise his prices for barbering some 25% to union levels.

Thereupon, members of the union prevailed upon the Memphis Linen Supply Company to refuse to deliver necessary laundry and barber supplies to respondent and commenced picketing his shop, which was located in his home, with signs reading, "This Shop Does Not Employ Union Barbers."

A preliminary injunction against picketing or otherwise obstructing or interfering with respondent's barber shop and home was issued by the Chancery Court of Shelby County, Tennessee, and subsequently made permanent.

On appeal to the Supreme Court of Tennessee, the Chancellor was first reversed but upon petition to rehear the original opinion was withdrawn and the Chancery Court was affirmed.

Argument

We respectfully submit that no Federal question is presented in this case in view of the fact that it is now settled beyond dispute that a State Court may enjoin peaceful picketing for an objective which it finds to be in violation of the State's public policy enunciated either by the legislature or the courts of that State, provided only that the policy is not in conflict with the Federal Constitution.[1]

In the present case, the Supreme Court of Tennessee found that the picketing violated both the State's Right to Work statute and its judicial policy against combinations which "tend to impair competition in trade and to enhance prices to the injury of the public."

Right to Work Statute

Tennessee's "Right to Work Law" provides that:

> "It shall be unlawful for any person, firm, corporation or association of any kind to deny or attempt to deny employment to any person by reason of such person's membership in, affiliation with, resignation from, or refusal to join or affiliate with any labor union or employee organization of any kind." (Tennessee Code, Section 50-208).

---

[1]Building Service Employees International Union v. Gazzam, 339 US 532, 94 L. ed 1045, 70 S. Ct. 784; International Brotherhood of Teamsters, C. & W. H. Union v. Hanke, 339 US 470, 94 L. ed 995, 70 S. Ct. 773, 13 ALR 2d 631; Hughes v. Superior Court of California, 339 US 460, 94 L. ed 985, 70 S. Ct. 718; Giboney v. Empire Storage & Ice Co., 336 US 490, 93 L. ed 834, 69 S. Ct. 684; Thomas v. Collins, 323 U S 516, 537, 538, and 543, 544 (concurring opinion), 89 L. ed. 430, 444, 445, 447, 448, 65 S. Ct. 315; Bakery & P. Drivers & Helpers, I.B.T. v. Wohl, 315 US 769, 776, 777 (concurring opinion), 86 L. ed 1178, 1187, 62 S Ct. 816; Carpenters & J. Union v. Ritter's Cafe, 315 US 722, 86 L. ed. 1143, 62 S. Ct. 807; Carlson v. California, 310 US 106, 84 L. ed. 1104, 60 S. Ct. 746; Thornhill v. Alabama, 310 US 88, 103, 104, 84 L. ed. 1093, 1102, 1103, 60 S. Ct. 736; Senn. v. Tile Layers Protective Union, 301 US 468, 479-481, 81 L. ed. 1229, 1236-1238, 57 S. Ct. 857; Local Union No. 10, A.F. of L. v. Graham, 345 US 192, 73 S. Ct. 585, 97 L. ed. 946.

Petitioners seek to show that the picketing in this case did not violate the above statute because of the allegations in the answer to the effect that they have never insisted that respondent or his employees join the union or that he discharge his present employees and that the purpose of the picketing was to advertise that the shop was being operated under non-union conditions. Petitioners point out that in Tennessee allegations of fact in an answer are admitted as true when the case is heard on bill and answer without the introduction of the testimony of witnesses.

Petitioners also admit in their answer, however, that a group of barbers had called on respondent, inviting him to "join with them" in an effort to improve working conditions and that the pickets in this case, all of whom were members of the Memphis barbers' union, carried signs reading, "This Shop Does Not Employ Union Barbers."

It is well settled in Tennessee, that in a hearing on bill and answer, legal deductions insisted on in the answer are not to be considered as true and that the judicial function of the court in drawing conclusions from those facts which are admitted is not eliminated or restricted in any way by this type of hearing. (*Rodgers v. Rodgers* (6 Heisk.) 53 Tenn. 489; *Seat v. Seat*, 172 Tenn. 618, 113 SW (2d) 751; *Petty v. Sloan*, 197 Tenn. 630, 277 SW (2d) 355).

Petty v. Sloan, supra, involved the construction of a written contract and was heard on bill and answer. The defendant contended that the construction must be determined in accordance with the allegations in the answer as to the intention of the parties. The Court pointed out, however, that legal deductions in the answer were not to be considered as true and that the ascertainment of the intention of the parties was a judicial function. It held:

> "We think that the parties are exactly in the same position as they would have been if the cause had not been set for hearing on bill and answer. Nobody has lost any rights by reason of the way the suit was tried below." (197 Tenn. 637).

We therefore insist that the purpose and objective of the picketing in the instant case was a matter of judicial inquiry and that the Court was not foreclosed in this inquiry by statements in the answer as to the intention of petitioners and conclusions of the pleader as to the purpose of the picketing.

In the case of *Pruitt v. Lambert*, decided by the Supreme Court of Tennessee on February 8, 1957 and reported in 298 SW (2d), 795, picketing was enjoined after a hearing on bill and answer as in the present case. The defendants averred in their answer that they had never insisted that the complainant discharge any of its employees or that any of said employees should join the union. The Supreme Court nonetheless judicially determined that the picketing "was coercive with illegal objectives" in violation of the State's Right to Work Law. It emphasized that the pickets carried placards reading:

> "This store does not employ Union members in its meat market.' "Neither does it observe hours, wages or working conditions prevailing in Union markets." "Please patronize stores where Union market cards are displayed."

and that the union proposed the execution of a contract which would have required the employer, among other things, to see that all of his employees remained in good standing with the union. The Court observed:

> "Then again, even if the employer had signed this contract, he would not have been entitled to display the

> Union card and would have been confronted still with the probability of being picketed for being a non-Union shop. Again, it is difficult to see how the employer could assist the business agent of the Union to see that all of his employees remain in good standing without forcing the nonunion employees either to join the Union and pay dues or to be discharged for failure to do so.
>
> In short, this type of picketing which is denominated 'stranger picketing' was not merely for the purpose of advertising but was coercive with illegal objectives."

The procedural situation in the instant case is similar to that in *Chucates v. Royalty*, 164 Ohio St. 214, 57 Ohio Ops. 432, 129 N. E. 2d 823, 37 LRRM 2028; certiorari denied 351 US 926, 100 L. ed. 1456, 76 S. Ct. 781, which was tried on an agreed statement of facts. It was insisted that the purpose of the picketing there enjoined was not set forth in the stipulation. The Court said:

> ". . . However, where parties agree that certain facts are 'the facts upon which' the 'court should consider' a case, the court, in deciding such case, may quite properly base its decision in part upon other facts that may reasonably be inferred from the facts agreed upon.
>
> In view of the facts agreed upon in the instant case, the Court of Appeals could hardly have found that there was any purpose for the picketing except the purpose of pressuring plaintiffs to compel their employees to join the defendant union." (37 LRRM 2030).

Petitioners have insisted in the present case that their purpose was to induce respondent to raise his prices but it is obvious from the facts admitted in the answer that had he done so, petitioners could and undoubtedly would have continued to picket as before because, "This Shop Does Not Employ Union Barbers."

The Supreme Court of Tennessee therefore apparently concluded, as it was entitled to do on the record in this case, that one of the objectives of petitioners' picketing was to coerce respondent to violate the State's Right to Work Law by either forcing his employees into the union or discharging them in order to employ union members. This is precisely the situation which prevailed in the case of *Plumbers' Union v. Graham*, 345 US 192, 73 S. Ct. 585, 97 L. ed. 946, where it was held that the Courts of Virginia might enjoin picketing carried on for the purpose of inducing a violation of that State's Right to Work Law.

Combination to Impair Competition and Enhance Prices

The avowed purpose of the picketing in the instant case was to coerce respondent to raise his prices to a level fixed by the union in its contracts with other employers and to injure or destroy his business if he continued to decline to do so.

The Supreme Court of Tennessee found that such an objective was in violation of the State's public policy against combinations designed to interfere with competition and to raise prices to the injury of the public. It quoted from *Bailey v. Master Plumbers*, 103 Tenn. 99, at page 100, as follows:

> "The Courts, with practical unanimity, hold that contracts, agreements, arrangements or combinations in whatever form or name, are contrary to public policy and void when they tend to impair competition in trade and to enhance prices to the injury of the public."

There can be no dispute regarding the Court's conclusion to the effect that petitioners were seeking in this in-

stance to further their campaign to eliminate competition between the barbers in Memphis insofar as prices were concerned, also to dictate the prices to be charged by the respondent, and to fix those prices at a level substantially higher than he was accustomed to charge. This constituted not only an invasion of respondent's right to determine what he would charge for his own labor which is a power denied even to the State[2] but was a penalty imposed upon the general public which must pay the higher prices to be charged.

[2] See *State v. Greeson*, 174 Tenn. 179, where a Tennessee statute authorizing the State Board of Barber Examiners to fix a schedule of prices for barber work was declared to be in violation of the due process and equal immunities provisions of the Federal and State Constitutions.

The Supreme Court further emphasized the unlawfulness of petitioners' effort to destroy respondent's business in order to enforce their demands. This it found to be violative of the State's public policy as laid down in the case of *Lyle v. Meat Cutters & Butchers*, 174 Tenn. 222, where picketing was enjoined upon the finding that it was conducted "for the purpose of coercing him (complainant) to join the union, or, upon his continued refusal, to injure or destroy his business." (174 Tenn. 228). The Court quoted the following rule with approval:

> "'Since the right to carry on a lawful business without obstruction is a property right, acts committed without just cause or excuse, which interfere with the carrying on of complainant's business and destroy his custom, his credit, or his profits, do an irreparable injury and authorize the issuance of an injunction.'" (174 Tenn. 230).

Conclusion

In summary, we respectfully insist that the Supreme Court of Tennessee has done nothing more in this case than

follow the principles laid down by this Honorable Court in that long line of decisions (see Note 1 above) culminating in the case of *International Brotherhood of Teamsters, Local* 695, *v. Vogt, Inc.*, 1 L. ed. 2d adv. sheets No. 15, p. 1347, 40 LRRM 2208, in finding that the picketing in question violated Tennessee's public policy on two different grounds and should be enjoined.

That public policy is not shown to be violative of the Constitution of the United States and therefore the writ should be denied.

Respectfully submitted,

Robert L. Taylor
208 Adams Avenue
Memphis, Tennessee

Newell N. Fowler
81 Madison Building
Memphis, Tennessee
Counsel for Respondent

Ulysses Burgess
81 Madison Building
Memphis, Tennessee
Of Counsel

CERTIFICATE OF SERVICE

I certify as attorney of record for the Respondent, L. A. Flatt, in the above styled and numbered cause in this Court that I have this day had mailed by air mail, postage prepaid, to Cecil Branstetter, Stahlman Building, Nashville, Tennessee, attorney of record for the Petitioners, at his said proper post office address, two true copies of this Brief in Opposition to the Granting of a Writ of Certiorari.

This 4th day of September, 1957.

Newell N. Fowler

Newell N. Fowler
81 Madison Building
Memphis, Tennessee